

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
HISPANIC INFORMATION AND)	
TELECOMMUNICATIONS NETWORK, INC.)	File No. 980129DE
)	
For Extension of Time to Construct Educational)	
Broadband Service (EBS) Station WLX681,)	
Portland, Oregon)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 2005

Released: April 29, 2005

By the Commission:

I. INTRODUCTION

1. We have before us an application for review¹ filed on April 22, 2002 by Hispanic Information and Telecommunications Network, Inc. (HITN) for Educational Broadband Service² (EBS) Station WLX681, Portland, Oregon. HITN seeks Commission review of a decision³ of the Video Services Division of the Mass Media Bureau (VSD) denying HITN's petition for reconsideration⁴ of the denial⁵ of HITN's application for an extension of time⁶ to construct EBS Station WLX681, Portland, Oregon. For the reasons stated below, we grant the HITN AFR in part, reinstate the Extension Application, and

¹ Application for Review (filed Apr. 22, 2002) (HITN AFR).

² On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing the Multipoint Distribution Service (MDS) and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O & FNPRM*). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Because the new rules are now in effect, we will refer to these services by their new names.

³ Letter of Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Hispanic Information and Telecommunications Network, Inc. and Molalla High School (Mar. 21, 2002) (*Letter Denying Reconsideration*). See also Wireless Telecommunications Bureau Site-by-Site Action, Report No. 1140, *Public Notice* (rel. Apr. 3, 2002). Effective March 25, 2002, the Commission transferred regulatory functions for the Instructional Television Fixed Service and the Multipoint Distribution Service/Multichannel Multipoint Distribution Service from the Mass Media Bureau to the Wireless Telecommunications Bureau (Bureau). Radio Services Are Transferred From Mass-Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, 17 FCC Rcd 5077 (2002).

⁴ Petition for Reconsideration (filed July 27, 1998) (HITN 1998 Petition).

⁵ Letter of Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Benjamin Perez, Esq., and Suzanne C. Spink, Esq. (Jun. 4, 1998) (*Letter Denying Extension*). See also Broadcast Actions, Report No. 44270, *Public Notice* (rel. Jun. 25, 1998).

⁶ File No. 980129DE (Extension Application).

remand the proceeding to the Wireless Telecommunications Bureau (Bureau) to determine whether the Extension Application should be granted.

II. BACKGROUND

2. The construction permit for Station WLX681 was granted to HITN on September 30, 1992, with a construction deadline of March 12, 1994.⁷ Between 1994 and 1996, HITN filed three applications for additional time to construct Station WLX681.⁸ All three applications were granted, thus extending HITN's construction deadline to January 29, 1998.⁹ On that date, HITN filed a further request for extension of time,¹⁰ which VSD denied on June 4, 1998.¹¹ In denying a further extension of time, VSD found that HITN "has failed to show that it made substantial progress toward construction of the station during the eighteen month authorized construction term"¹² VSD canceled the construction permit for WLX681 and deleted the station's call sign.¹³

3. HITN filed for reconsideration of this decision on July 27, 1998.¹⁴ On August 13, 1998, Molalla River School District (Molalla), an educational institution in the Portland area, filed an opposition.¹⁵ On January 20, 2000, VSD released a public notice announcing a grant of HITN's request for extension of time to construct Station WLX681.¹⁶ On February 16, 2000, Molalla requested that the Commission rescind this grant.¹⁷

4. On June 1, 2000, VSD issued a letter rescinding the *Grant Public Notice*, stating that the grant had been in error, while noting that HITN's 1998 Petition remained pending.¹⁸ On July 17, 2000, HITN responded to this decision, noting that Station WLX681 had been constructed and was operational.¹⁹ On March 21, 2002, the Division denied HITN's 1998 petition for reconsideration and dismissed HITN's applications for modification of WLX681.²⁰ On April 22, 2002, HITN filed the HITN AFR.²¹

⁷ File No. BPIF-19841020DA (granted Sep. 30, 1992).

⁸ File Nos. BEIF-19940331DZ (granted Sep. 28, 1994), BEIF-19940923DX (granted Nov. 23, 1994), BEIF-19950523DY (granted Aug. 8, 1996).

⁹ File No. BEIF-19950523DY.

¹⁰ Extension Application.

¹¹ *Letter Denying Extension, supra*.

¹² *Id.* at 3.

¹³ *Id.* at 4.

¹⁴ HITN 1998 Petition.

¹⁵ Opposition to Petition for Reconsideration (filed Aug. 13, 1998).

¹⁶ Instructional TV Fixed Service Actions, Report No. 158, *Public Notice* (rel. Jan. 20, 2000) (*Grant Public Notice*).

¹⁷ Letter from Robert F. Corazzini, Esq. and Suzanne S. Goodwyn, Esq. to Magalie Roman Salas (Feb. 16, 2000) (February 16, 2000 Letter).

¹⁸ Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Benjamin Perez, Esq. (Jun. 1, 2000) (Rescission Letter).

¹⁹ Letter from Ernest T. Sanchez, Esq. to Magalie Salas (Jul. 17, 2000).

²⁰ *Letter Denying Reconsideration, supra*.

²¹ Molalla filed an opposition to the HITN AFR on May 10, 2002. Opposition to Application for Review (filed May 10, 2002). However, on March 7, 2005, Molalla's pleading was dismissed at its request. See Letter from John J.

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III. DISCUSSION

5. HITN maintains that VSD's decision was arbitrary and capricious because Commission staff has a long history of granting extensions of time based upon showings more modest than that made by HITN – including granting eighteen extensions of time to another Portland area EBS licensee.²² HITN further argues that the January 20, 2000 *Grant Public Notice* demonstrates this clearly.²³ Moreover, HITN maintains, VSD gave insufficient weight to the efforts HITN had made toward construction during its prior extension periods. HITN further maintains that VSD misunderstood certain of HITN's representations, which resulted in an air of mistrust on VSD's part. Furthermore, in a supplemental filing, HITN notes that the Commission has recently acknowledged that, with respect to late-filed EBS applications, actual Commission staff practice “demonstrates that [EBS] licensees have come to rely on the exceptional leniency exercised by staff in processing such applications and associated waivers.”²⁴ HITN argues that identical reasoning applies to HITN's situation and to applications for EBS construction permit extensions generally.²⁵

6. HITN notes that it had completed construction of Station WLX681 by June 19, 2000, within six months of the January 20, 2000 grant announcement. HITN states that it completed construction of Station WLX681 in the belief that the *Rescission Letter* was invalid because it was released more than forty days after the January 20, 2000 grant, in contravention of the requirements of Sections 1.108 and 1.117 of the Commission's Rules. HITN argues that it has relied to its detriment on the January 20, 2000 grant,²⁶ and that reversal of the rescission and grant of HITN's application for review will further the public interest by allowing HITN promptly to commence service to the Portland market.²⁷ HITN states that Station WLX681 is constructed, but is not operating in accordance with the Commission's staff directive, pending the outcome of the instant AFR.²⁸ HITN reports that it has entered into an excess capacity lease with Clearwire, a wireless broadband services company, which, in conjunction with NextNet (a Clearwire subsidiary) and Intel, is developing WiMAX network worldwide, including plans to provide such services in the Portland market over HITN's channels.²⁹

7. After reviewing the record, we conclude that HITN's Extension Application should be reinstated. Under the rules in effect at the time, the Commission granted applications for extension of time to construct EBS stations upon a specific and detailed narrative showing that the failure to complete construction was due to causes that were beyond the permittee's control, or upon a specific and detailed showing of other sufficient justification for an extension.³⁰ Based upon the information available to us, it appears that the former Mass Media Bureau developed a policy of liberally granting extensions of time to

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Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau to Wayne D. Kostur and Rudolph J. Geist, Esq. (Mar. 7, 2005). Accordingly, we will not consider the arguments made in that opposition or HITN's reply to that opposition.

²² AFR at 16-17.

²³ *Id.* at 17-18.

²⁴ Supplement to Application for Review, *citing* Eastern New Mexico University, *Memorandum Opinion and Order and Order on Reconsideration*, 19 FCC Rcd 19540 (WTB 2004).

²⁵ *Id.* at 3.

²⁶ HITN AFR at 20-21.

²⁷ *Id.* at 22-24.

²⁸ Supplement to Application for Review at 3.

²⁹ *Id.* at 3-4.

³⁰ 47 C.F.R. § 73.3534(c).

construct for EBS stations. It is not clear that VSD's treatment of the Extension Application was consistent with its general treatment of other EBS applications for extension of time to construct. For example, a review of the Commission's licensing records indicates that there are many instances where the construction deadline was extended beyond the original ten-year license term.³¹ In some of those cases, over ten applications for extension of time to construct were granted.³² Furthermore, it appears that most extensions have been granted without any published discussion of the criteria for extensions of time. In contrast, HITN's application for a fourth extension of time to construct was denied, despite a showing that HITN had made at least some progress in construction.

8. It is axiomatic that the Commission must explain reasons for treating similarly situated applicants differently.³³ In this case, we question whether that requirement was met. We believe the appropriate course of action is to reinstate HITN's Extension Application for processing consistent with our rules and policies.

IV. CONCLUSION AND ORDERING CLAUSES

9. For the reasons discussed above, we grant HITN's application for review in part and reinstate HITN's application to modify Station WLX681. We direct the Bureau to consider the Extension Application and determine whether it should be granted.

10. Accordingly IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155, and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the application for review filed April 22, 2002 by Hispanic Information and Telecommunications Network, Inc. IS GRANTED to the extent indicated, and the application for extension of time to construct filed by HITN on January 29, 1998 (File No. 980129DE) IS REINSTATED.

11. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, that the Broadband Division of the Wireless Telecommunications Bureau SHALL PROCESS the application for extension of time filed by HITN (File No. 981029DE) and the application for certification of completion of construction filed by Hispanic Information and Telecommunications Network, Inc. on July 17, 2000 in accordance with this *Memorandum Opinion and Order* and the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³¹ See, e.g., Stations WLX505, WLX544, WLX553, WLX554, WLX690, WLX840, WLX879, WLX884.

³² See, e.g., Stations WLX505 (eleven extensions granted), WLX544 (twelve extensions granted), WLX553 (thirteen extensions granted).

³³ *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965).